

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6021

To be argued by
WALLACE MUSOFF

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

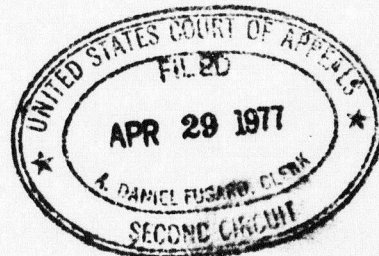
vs.

SALVATORE CIRAMI, ET AL.,
Defendants,

SALVATORE CIRAMI & MARGARET CIRAMI,
Defendants-Appellants.

**REPLY BRIEF FOR
DEFENDANTS-APPELLANTS**

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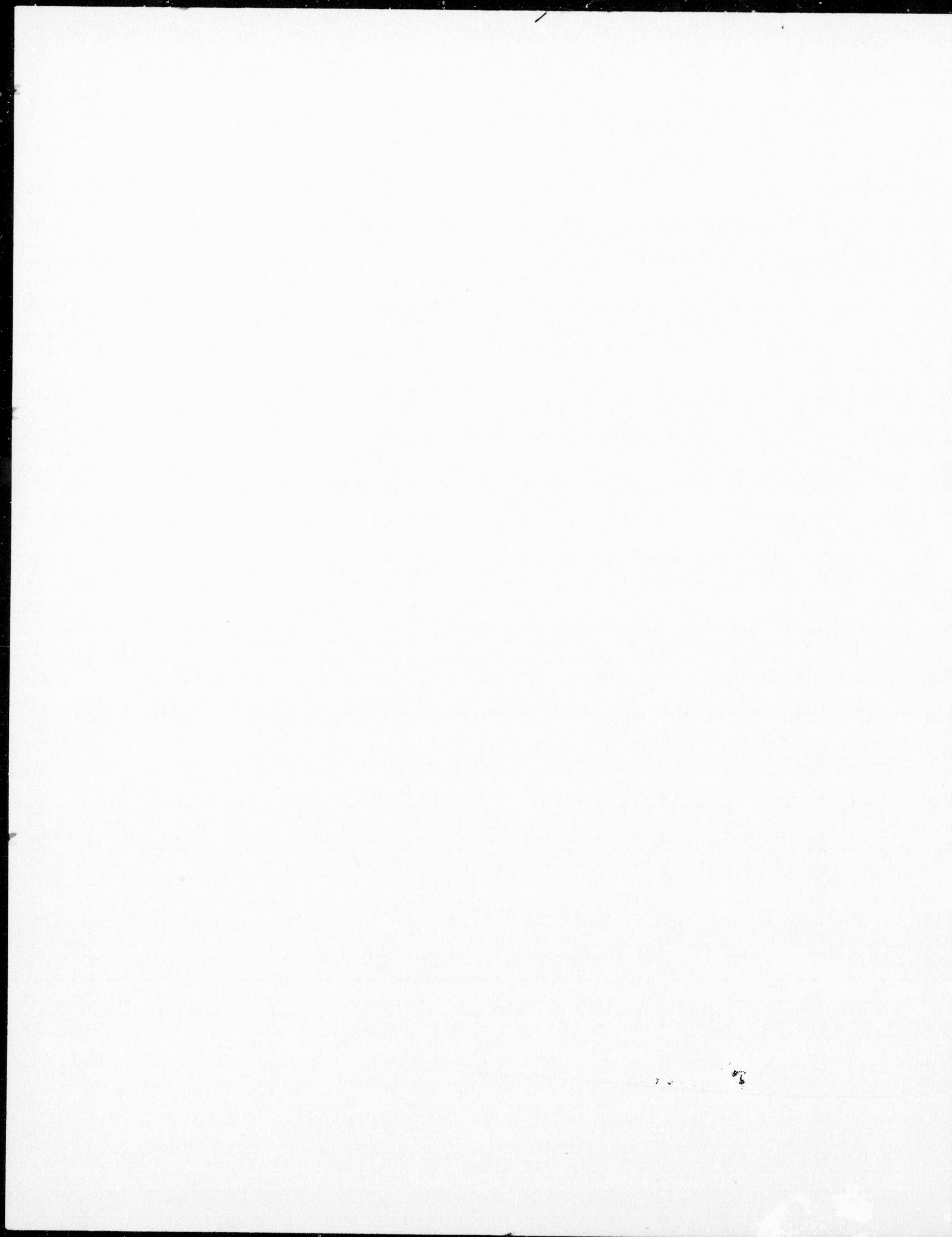


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

Docket No. 77-6021

SALVATORE CIRAMI, et al.,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF

Preliminary Statement

This brief is submitted on behalf of Appellants Salvatore and Margaret Cirami in reply to specific arguments and statements made in the brief of Appellee United States of America. Failure to reply to a particular matter in the Government's brief means only that the matter has been sufficiently addressed in Cirami's main brief or that it is insignificant with respect to the disposition of this case.

POINT I

THE DISTRICT COURT ERRED IN REFUSING TO
ENTERTAIN APPELLANTS' RULE 60(B)(6) MOTION

The District Court improperly refused to consider appellants' newly-discovered evidence presented in its renewed Rule 60(B)(6) motion to vacate the earlier judgment entered on June 12, 1974. The District Court based its refusal to reconsider upon this Court's earlier decision in United States v. Cirami, 535 F.2d 736 (2d Cir. 1976), and considered itself precluded by the "law of the case" doctrine from even entertaining a second application at all, unless authorized to do so by this Court. (A. 261-262).

Under the unique facts of this case, such a course was clear error. As this Court made clear in its decision (535 F.2d at 741), the signal and primary reason for its earlier affirmance rested upon appellants' utter failure to tender any explanation as to the reason for prior counsel's default, or the diligence of appellants' effort to elicit such information from their former attorney.

Moreover, this Court noted that the record was totally silent as to whether prior counsel's failure to contest the motion for summary judgment was deliberate and strategic or merely inadvertant (535 F.2d at 739).

Based upon this dearth of evidence - which, in fact, was unavailable to the Ciramis at the time of their prior appeal - this Court affirmed the District Court's denial of appellants' earlier Rule 60(B)(6) motion, without either a remand for an

evidentiary hearing or any specific mandate for further proceedings in accordance with its decision.

Accordingly, appellants subsequently renewed their previous Rule 60(B)(6) motion before the District Court providing such further documentation as previously had been found lacking by this Court.

As was documented in affidavits submitted to the Court below, appellants' prior counsel finally responded to the Ciramis' repeated entreaties and allowed himself to be interviewed as to the reasons for his default - which were discovered to be psychiatric in nature.

In support thereof, prior counsel provided an affidavit disclosing the nature of his mental illness and the reasons for his default - matters with which appellants had no prior knowledge or suspicion. Documentation was also provided the Court below by counsel's psychiatrist as to the circumstances of his psychotherapy.

Moreover, extensive affidavits were submitted by Cirami, his attorney and accountants as to their extensive and utterly fruitless attempts at securing this information at earlier stages during the course of this litigation.

Despite this extensive documentation, which clearly established on its face appellants' colorable and meritorious defense to the previously-entered default, the District Court refused to consider

this newly-discovered evidence at all - deeming itself precluded by this Court's earlier decision from any reconsideration of this issue, even in the face of newly-discovered evidence materially altering the facts under which the cause was originally considered, relying principally on United States v. Fernandez, 506 F.2d 1200 (2d Cir. 1974).

Fernandez, however, is clearly inapposite in the present context. Fernandez involved a case which had been remanded with specific instructions, in which the District Court chose to deviate significantly from the terms of this Court's mandate. Under these circumstances, this Court properly reversed, stating in no uncertain terms that the District Court clearly was bound by the specific terms of this Court's remand to proceed in accordance therewith. Id., 506 F.2d at 1203.

In the instant case, however no such remand was forthcoming. This Court simply affirmed the District Court's denial of the previous Rule 60(B)(6) motion on the grounds that, given the paucity of documentation hitherto provided as to the reason for default, the District Court's denial of the motion could not be deemed an abuse of discretion. (535 F.2d at 741)

Significantly, though this Court devoted length in its opinion to denoting precisely those factors in appellants' prior submissions deficient in specificity as to the merits of their claim, it noted as well the inherent plausibility of appellants' defense on the merits against the Government's tax claims. (535

F.2d at 741).

Such an "advisory" opinion on this Court's part clearly warranted appellants' resubmission of the Rule 60(B)(6) motion to the District Court, in order to remedy the defects in appellants' earlier submission - defects which were caused by the hitherto undisclosed psychiatric problems of appellants' prior attorney.

Furthermore, nothing contained within the provisions of Rule 60(B) suggest that appellants are precluded, as in the instant case, from renewing the instant Rule 60(B)(6) motion on the basis of newly-discovered evidence unavailable at the time of the original motion, which alters materially the factual context in which the Court rendered its earlier decision.

Clearly, motions under Rule 60(B)(6) are directed to the exercise of the District Court's discretion, which will be overturned in appeal only upon a showing of abuse thereof. United States v. Cirami, supra, 535 F.2d at 741.

In the instant case, however, the District Court did not exercise its discretion at all, considering itself powerless in the face of this Court's prior action. Accordingly, under these circumstances, where the present motion has not been considered by the District Court on the merits, and where the District Court has not, in fact, exercised its discretion on the merits, considering itself jurisdictionally barred therefrom, the matter should be remanded for reconsideration in the merits. Ct. Vindigni v. Meyer, 441 F.2d 376 (2d Cir. 1971).

POINT II

THIS COURT SHOULD RECONSIDER ITS PRIOR
DECISION IN LIGHT OF NEWLY DISCOVERED
EVIDENCE

It is manifest that, in light of the newly-discovered evidence submitted to the Court below, this Court has the authority to reassess its prior decision de novo in light of such evidence, irrespective of whether or not the District Court precluded from such reconsideration in the first instance. United States v. Fernandez, supra.

Indeed, as this Court has previously noted, an appellate court may, in fact, reexamine its ruling in a prior appeal of the same case where "much evidence appear[s] in the second appeal [was] not directly presented in the first." Id., 506 F.2d 1204 n. 9, citing Commercial National Bank in Shreveport v. Connolly, 176 F.2d 1004, 1006 (5th Cir. 1949) (en banc).

Accordingly, the newly-discovered evidence submitted by appellants to the Court below clearly warrants review by this Court, as it provides full explanation for prior counsel's earlier default and, in fact, clearly demonstrates appellant's meritorious claim of entitlement to relief under Vindigni v. Meyer, supra, and L.P. Steuart, Inc. v. Matthews, 329 F.2d 234 (D.C. Cir. 1964), as it establishes not merely prior counsel's simple negligence, but such a quantum of "gross negligence" as to bring the instant motion properly within the ambit of Rule 60(B)(6), rather

than Rule 60(B)(1).*

As the affidavits by the Cirami's present attorneys and accountant demonstrate, the Ciramis and their counsel exerted diligent and constantly fruitless attempts to secure information from their prior attorney to ascertain the reason for his default, which resulted in the District Court's entry of summary judgment against them. (A. 197-202).

The affidavits clearly demonstrate that prior counsel, despite repeated counsel's, or Cirami's, inquiries, refused to answer telephone calls or to contact counsel, or the Court, in order to provide any explanation for his apparent abandonment of the Cirami's action, which default resulted in the entry of an approximately \$270,000 judgment against the Ciramis, in a tax deficiency proceeding to which they had a colorable and meritorious defense.

Moreover, as the newly submitted affidavits demonstrate, prior counsel successfully avoided all contact with his former client until after this Court's previous decision in United States v. Cirami, supra. Thus, for all intents and purposes, the Ciramis were, in fact unable to provide a colorable explanation for counsel's default until after the previous appeal, because counsel was, by

* Significantly, appellants' instant motion, as well as the original motion, were both predicated under Rule 60(B)(6), which provides no statute of limitation other than that the motion be made within a "reasonable time."

his very evasiveness, totally unavailable for inquiry.

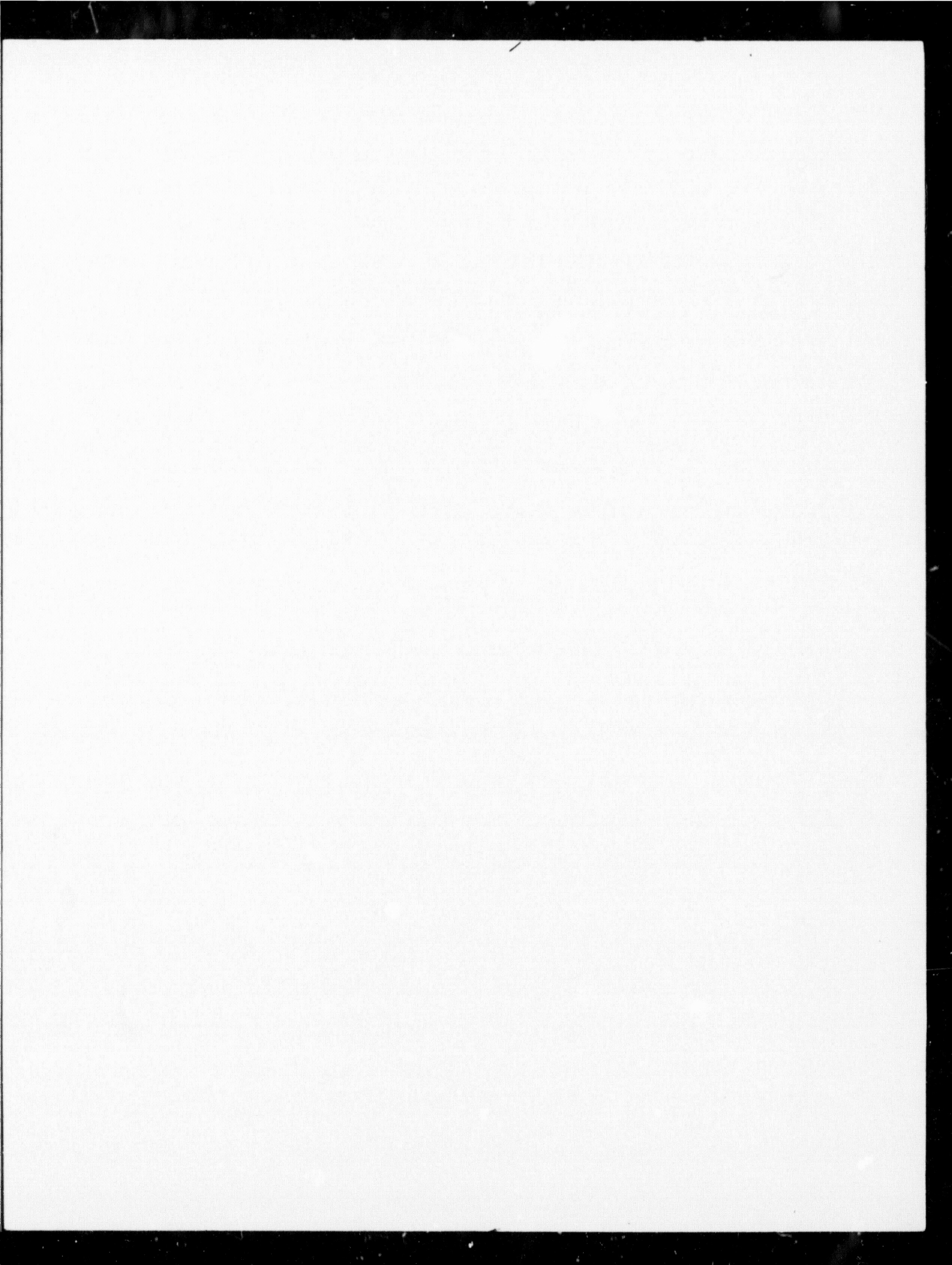
Ct. Vindigni v. Meyers, supra.

Thereafter, as disclosed in the affidavit of the Ciramis present attorney Wallace Musoff (A. 191-194), it was not until meeting with prior counsel in June of 1976 - a meeting precipitated by this Court's prior decision - that it was disclosed for the first time that the Ciramis's prior attorney suffered a serious psychiatric breakdown that effectively precluded his completion of work promised to clients.

Furthermore, it was then disclosed for the first time that counsel was presently the subject of disciplinary proceedings before the Bar Association regarding his failure to perform services for his other clients resulting from his mental disorder. Thus, the Ciramis were not the only clients to have suffered grievously at the hands of this mentally disturbed individual. As part of the renewed Rule 60(B)(6) motion, an affidavit was submitted to the Court below by this attorney, as well as a statement by his psychiatrist. (A. 203-207).

Despite this wealth of evidence presented to the Court below which, on its face, clearly entitles the Ciramis to relief, the District Court deemed reconsideration of the merits of the renewed Rule 60(B)(6) motion, deferring instead to this Court.

In light of the District Court's posture, then, it is submitted that this Court must exercise its supervisory power to



reconsider its prior ruling, or, in the alternative, direct the District Court to properly exercise its discretion by reconsidering the Cirami's claims on the merits.

As this Court observed in its first consideration of this action (535 F.2d at 740), "extreme hardship", the element found previously to have been lacking, could, in fact, be satisfied where a lawyer, at the time of default, was suffering from serious personal problems, such as serious family illness, citing L.P. Steuart, Inc. v. Matthews, supra.

As the D.C. Circuit held in Steuart, in affirming the granting of a Rule 60(B)(6) motion to reinstate an action:

Counsel's neglect was not excusable and the Court, by clear implication, so found. The judge said he felt that in this particular case the client, plaintiff, a person unfamiliar with Court procedures, should not be penalized by the action of his counsel, who admittedly did not attend to the matter when he received notice of the contemplated dismissal.

The majority added:

Clause (1) of Rule 60(B)(6) is not and clause (6) is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client. Clause (6) 'vests power in the courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice...'

Id., 329 F.2d at 235-36.

Moreover, in indicating his sympathy with the approach taken in Steuart, Professor Moore has commented upon the salutary practice of treating such instances of gross negligence

as occurring within the ambit of Rule 60 (B) (6):

In most cases, however, litigation is handled by lawyers and whatever negligence is involved in the losing of cases is theirs, not the personal negligence of their clients. While in other spheres of life a person may not excuse his breaches of duty on the ground that the negligence was that of his agent...courts have shown considerable sympathy for the plight of the diligent litigant with an incompetent or sloppy lawyer... Obviously the greater the negligence involved, or the more wilful the conduct, the less "excusable" it is; on the other hand, the more inexcusable it is, the greater the sympathy with the ultimate victim. Some courts have resolved this dilemma by treating "gross" negligence by counsel as constituting special circumstances taking the case out of subdivision (b) (1), and affording relief under (b) (6).

7 J. Moore, Federal Practice (2d Ed.), ¶60.27[2].

Clearly, then, the rationale of Steuart is directly applicable in the instant case. First, as was established in the affidavits before the Court below, the Ciramis never even had knowledge that summary judgment had been granted against them until their files were retrieved from their defaulting prior attorney. It was, thereupon, in the wake of this discovery that the Cirami's first Rule 60(B) (6) motion was predicated, at a time when the parties were, in fact, unable to elicit from counsel the reason for his default, an essential ingredient of the motion that this Court found lacking.

Thereupon, as disclosed in the affidavit of Cirami's present attorney Wallace Musoff, it was upon being informed that his name and conduct were discussed in this Court's Cirami opinion, that

defaulting counsel finally agreed to cooperate with Musoff and disclose the psychiatric reasons for his failure to zealously protect his client's interests - newly discovered information which the Cirami's had been hitherto unable to elicit from counsel, and which information was, indeed, sheltered, from discovery the physician-patient privilege.

Thus, if the "personal problems" found in Steuart were sufficient to grant a Rule 60(B)(6) motion, counsel's mental illness, which was hidden from his clients and the Court, and which precipitated the instant default, must cause the same result.

Moreover, in yet another respect, the instant renewed motion, which documents the bizarre psychiatric manifestations of defaulting counsel, his conscious avoidance of Cirami's inquiries and Cirami's good faith and persistent efforts to secure information from counsel, clearly parallels the plight of plaintiff in Vindigni v. Meyers, supra, wherein counsel simply disappeared and this Court, accordingly, reversed the denial of Rule 60(B)(6) relief.

In the instant case, counsel's mental illness effectively precluded his completion of work on ~~the~~ Cirami's action and his constant avoidance of all inquiries from his client - and the Court - parallel the "disappearance" of plaintiff's counsel in Vindigni.

Furthermore, the interests of justice mandate that the relief sought herein be granted. The Ciramis are defendants in this action and have, in fact, suffered the entry of a staggering \$270,000 judgment against them in a case in which the malfeasance of counsel has effectively precluded them from making a colorable and meritorious defense. Clearly, this preclusion of a defense renders the Ciramis' plight in sharper relief from the litigants in Vindigni and Steuart, who, as plaintiffs, were permitted to have their defaults reinstated.

As this Court noted in Cirami I (535 F.2d at 741), the the most noteworthy distinction between the Ciramis and plaintiffs in Vindigni and Steuart was a factual one - the failure of the Cirami's to come forward with demonstrable evidence of "gross negligence" and "client diligence."

These flaws - which were unavoidable at the time of the first Rule 60(B)(6) motion due to prior counsel's avoidance of his client - were rectified by counsel, and the documentation reflected in the Ciramis' renewed motion provide explicit substantiation both of the Ciramis' good faith attempts to contact counsel, their meritorious defense to the underlying claim, and gross negligence of earlier counsel due to his mental illness.

Accordingly, in light of the newly-discovered evidence submitted in support of the Ciramis' renewed Rule 60(B)(6) motion,

this Court must reconsider its prior determination in this action on the merits, or, alternatively, to remand to the District Court with directions that it provides such reconsideration on the merits in the first instance.

CONCLUSION

For the foregoing reasons, and for the reasons stated in appellants' main brief, the order appealed from should be reversed and the matter remanded for trial on the merits; or, in the alternative, an evidentiary hearing on the merits of appellants Rule 60(B)(6) motion.

Dated: New York, New York
April 25, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

SALVATORE CERAMI, et al,

Defendants,

SALVATORE CIRAMI & MARGARET CIRAMI,

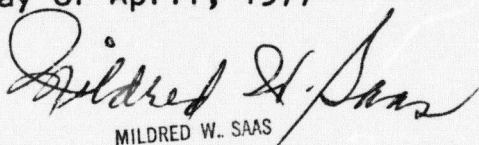
Defendants-Appellants.

Affidavit of Service
by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Muriel Mayer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides 22 Longview Road, Old Bridge, New Jersey 08857. That on the 27th day of April, 1977, deponent served the annexed Reply Brief upon United States Attorney, David Trager, Esq., 225 Cadman Plaza, Brooklyn, New York 11201 and United States Attorney, Gilben Andrews, Esq., United States Department of Justice, Washington, D.C. 20530, the address designated by said attorney for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 27th
day of April, 1977



MILDRED W. SAAS

NOTARY PUBLIC OF NEW JERSEY

My Commission Expires February 2, 1978


Muriel Mayer